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No. 79-1318

In the Supreme Court of the United States

OCTOBER TERM, 1979

VINCENT LIBERTI, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 41a-51a) is not yet reported. The order of the district court (Pet. App. 5a-34a) is reported at 464 F. Supp. 164. The order of the district court on reargument (Pet. App. 35a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1980. The petition for a writ of cer-

tiorari was filed on February 25, 1980 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether stolen property seized in plain view from petitioners' residence by postal inspectors lawfully on the premises to execute a search warrant should have been suppressed on the ground that the discovery of the property allegedly was not "inadvertent."

STATEMENT

On July 10, 1978, postal inspectors conducted a search of petitioners' home pursuant to a search warrant issued by a federal magistrate. Petitioners thereafter filed a motion in the United States District Court for the Southern District of New York seeking suppression and return of the property that had been seized during the search. Following an evidentiary hearing, the district court granted the motion to suppress but denied the motion for return of the property (Pet. App. 5a-40a). The court of appeals reversed the suppression order (Pet. App. 41a-51a).

Prior to the entry of the suppression order, petitioner Vincent Liberti was charged, in an indictment filed in the district court on December 15, 1978, with mail fraud and conspiracy to commit that offense, in violation of 18 U.S.C. 1341 and 371. The property seized during the search at issue here is the principal

evidence against Liberti on the criminal charges, which remain pending in the district court.

The evidence is summarized in the opinion of the court of appeals (Pet. App. 41a-46a). It showed that on June 12, 1978, James Boyle, a United States Postal Inspector, was informed by security personnel at the Saks Fifth Avenue department store that several employees were believed to be stealing merchandise and sending it home through the mail. Petitioner Vincent Liberti was one of those under suspicion. An employee of the Saks mailing room told Boyle that he had mailed "several parcels" to the Liberti residence during the preceding year. However, he could fix no specific dates for the mailings and had no knowledge of the contents of the packages. Other employees stated that parcels "may have been mailed" to the Liberti address but did not say how many.

After Boyle began his investigation, two packages addressed to the Liberti home were identified as having passed through the mail room. One package had been mailed from Saks on June 23 and the other package had been delivered to the Liberti residence on June 29. The contents of the first box were unknown, and postal authorities were unable to determine whether that box had been delivered. The second box, delivered on June 29, was known to contain Estee Lauder cosmetic gift boxes.

Before applying for a search warrant, Boyle consulted with an Assistant United States Attorney, who advised him that a warrant should be sought only

with respect to the June 29 box, on the ground that probable cause existed only as to that box. Accordingly, Boyle's application was directed to the June 29 box. In his affidavit, Boyle stated that for several weeks he had been investigating possible mail fraud violations by employees at Saks; that during this period a Saks security employee had observed brown cardboard boxes addressed by hand and lacking the customary invoices and documents being prepared for mailing; and that several of these boxes had been opened and were found to contain clothes, cosmetics, and other Saks merchandise. In addition, the affidavit stated that a brown cardboard box addressed to petitioner Barbara Liberti had been delivered to her on June 29 and that the contents had been examined prior to mailing and consisted of Estee Lauder gift boxes belonging to Saks. Based on this information, the magistrate issued a warrant authorizing a search of the Liberti residence and the seizure of "one (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violation of Title 18, United States Code, Section 1341."

Although Boyle did not know what property would be found in the Liberti residence, he "believed" or "assumed" that Saks merchandise other than that contained in the June 29 box might be found. Boyle did not participate in the search of the Libertis' house. The warrant was executed by three postal inspectors, accompanied by a security manager from Saks who was present to identify Saks merchandise.

Boyle instructed the inspector in charge of the search that he could seize any items belonging to Saks that were not properly on the premises until he found the goods covered by the warrant, at which time the search was to cease.[1]

At the Liberti residence the inspectors gave Mrs. Liberti a copy of the warrant and told her that they were looking for a brown box containing Estee Lauder cosmetics. Mrs. Liberti led the inspectors to a hall closet, opened the door and said, "This is all I have." The inspectors observed boxes of cosmetics stacked on both the shelf and the floor of the closet. The Saks security manager confirmed that these were Saks items, and they were seized by the inspectors. However, the brown box identified in the warrant was not in the closet.

In response to the inspectors' request, Mrs. Liberti directed them to the basement. As the inspectors descended the stairs leading to the basement, they saw under the open stairway a quantity of boxes and shopping bags containing additional cosmetics. After the security officer confirmed that this was also Saks merchandise, it too was seized.[2] The June 29 box was never found.

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[1] Although one of the three inspectors apparently did not understand the limited scope of the search, that inspector did not discover or seize any of the evidence that petitioners moved to suppress.

[2] The inspectors also found a blue nylon bag and a brown tote bag, both identified as Saks merchandise, in a bedroom closet. On appeal the government did not contest the suppression of these two items.

ARGUMENT

Petitioners contend (Pet. 27-42) that the merchandise seized in plain view from their residence by the postal inspectors should have been suppressed because its discovery was not "inadvertent" within the meaning of the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

1. Consideration of the instant case by this Court would be premature, since criminal charges are currently pending against petitioner Vincent Liberti in the district court. The ruling of the court of appeals thus places petitioner in the same position he would have occupied if the district court had denied the motion to suppress in the first instance. Such a denial would not have been subject to pretrial appeal. *DiBella* v. *United States*, 369 U.S. 121 (1962). The same considerations that counsel against interlocutory appeals of denials of suppression motions weigh against interlocutory review of the suppression issue by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). At trial petitioner may be acquitted, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by seeking review of the final judgment.[3]

[3] Since petitioner Barbara Liberti has not been charged with any criminal offense, her only interest is in the return of the property, not its suppression from evidence at trial. See Fed. R. Crim. P. 41(e). The district court, however, denied the motion for return of the property after finding that "[t]he evidence presented at the hearing tended to show that the seized property may have been the fruit of an illegal scheme" (Pet. App. 34a). Petitioners never appealed that aspect of the court's order. Accordingly, the question of the validity of the search and seizure is moot as to Mrs. Liberti, since she would not be entitled to any relief even if she prevailed in this litigation. See *United States Parole Commission* v. *Geraghty*, No. 78-572 (Mar. 19, 1980), slip op. 7-8.

2. On the merits, the court of appeals was correct in rejecting petitioners' Rule 41 motion. In *Coolidge* v. *New Hampshire*, *supra*, a plurality of this Court concluded that in order for property to be subject to seizure under the "plain view" doctrine, its discovery must be "inadvertent." The plurality explained (403 U.S. at 470-471):

> [A] plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."

As the court of appeals observed (Pet. App. 46a), most courts have accepted this portion of the plurality opinion as established law. Whatever the status of the "inadvertency" doctrine, however, it has no bearing on the instant case, since the discovery of the mer-

chandise by the postal inspectors was "inadvertent" within the meaning of *Coolidge*.[4]

The creation of the "inadvertency" standard in *Coolidge* was premised on the necessity of obtaining a warrant "where the police know in advance the location of the evidence and intend to seize it * * *." 403 U.S. at 470. Since a warrant cannot be issued without probable cause, in order for the government to be charged with advance knowledge it must at the least have had information amounting to probable cause to believe that the property seized in plain view would be found on the premises to be searched. See *United States* v. *Hare*, 589 F.2d 1291, 1293-1296 (6th Cir. 1979). No such probable cause existed here. Although an employee in the Saks mailroom told Boyle that he had mailed several parcels to petitioners' residence during the preceding year, he could fix no specific dates for the mailings, and he had no knowledge of the contents of the packages. Indeed, other employees could state only that parcels "may have been mailed" to petitioners' address. The only package other than the one the inspectors obtained authorization to seize that was specifically identified as having been mailed to petitioners went through the mail room on June 23. But the contents of this box were unknown, and postal authorities were un-

[4] It is our view that the inadvertency requirement is not sound and should not be adopted by this Court. In a suitable case, where the outcome depended upon the validity of the doctrine, we would favor review of the question by the Court. This, however, is not such a case.

able to determine whether it had been delivered. Moreover, this information had become somewhat stale by July 10, the date of the warrant application. Thus, while the postal inspectors may have suspected that they would find other stolen merchandise in petitioners' home, they obviously did not "know" or have probable cause to believe that they would find it. Their seizure of the merchandise was therefore valid under the "plain view" doctrine.[5]

Petitioners argue (Pet. 15-26, 38-42) that the government may not claim that it lacked probable cause to obtain a warrant to seize the additional merchandise, because it presented no information to the magistrate upon which he could make that determination. But as the court of appeals correctly stated in laying that argument to rest (Pet. App. 49a),

> Where, as here, the police "know" or "have probable cause to believe" with respect to one shipment only, a requirement that they tender all evidence and information in their possession concerning possible other shipments is both impractical and unnecessary. A magistrate is not going to give them more searching authority

[5] In any event, the *Coolidge* plurality concluded that the "inadvertence" requirement does not bar the seizure of stolen goods or contraband that a defendant is not lawfully entitled to possess. 403 U.S. at 471. See *United States* v. *Cutts*, 535 F.2d 1083, 1084 (8th Cir. 1976). As Judge Newman, concurring below, observed (Pet. App. 50a), the goods at issue here were stolen, and that in itself provided sufficient reason to reverse the suppression order.

than they seek, and wise police will not ask for more than that to which they are entitled. If the district court is suggesting that the police must request unlimited search and seizure in every case, even though they do not believe it is justified, we find the suggestion to be without merit.

Since the warrant was limited to the items of cosmetics delivered on June 29, the permissible scope of search was correspondingly limited, and the warrant could not serve as a basis for a general search for other stolen goods suspected to be on the premises. Inspector Boyle so instructed the agents executing the warrant, and there is no evidence that the seizures that occurred were otherwise than in the course of due execution of the warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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